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No. 02-9065

NOV 18 2003

In The

Supreme Court of the United States

SHAKUR MUHAMMAD, aka John E. Mease,

Petitioner,

v.

MARK CLOSE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION AND SUMMARY

Resisting the questions this Court crafted in this case, Respondent devotes much of his brief to raising new issues that he never disputed in the lower courts, recycling old issues that were ruled upon and then abandoned below,[1] and heralding irrelevant and contested details – some without citation to record material[2] – that malign Petitioner personally or lawsuit-filing prisoners generally. The most striking aspect of Respondent's focus is his contention that, contrary to the premise inherent in the first question presented in this case, Petitioner's § 1983 suit *is* a fact-or-duration case because under state law, Petitioner's major misconduct violation resulted in the loss of good-time credits for the month in which he was found guilty of that violation. Respondent says nothing about his failure to object to or appeal the lower courts' assumption that "there has been no deprivation of good-time credits" in this case. *See* Brief in Opposition 27a. Waiver aside, Respondent is factually wrong on this point because under Michigan law, "a defendant [such as Petitioner] sentenced as an habitual offender is not entitled to disciplinary credits." *People v. Carson*, 560 N.W.2d 657, 674 (Mich. Ct. App. 1997).

Once Respondent turns to the merits of the questions this Court granted certiorari to consider, he advocates a strictly policy-based test that is untethered to the language of 42 U.S.C. § 1983, its history, or any need to

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[1] This includes several references to Petitioner's failure to exhaust his administrative remedies, though Respondent raised and lost that issue in the district court. Respondent also questions "whether Petitioner was even engaged in First Amendment activity," while admitting that "that question is not before this Court." Brief for Respondent at 31 n.9.

[2] *See, e.g.*, Brief for Respondent at 3 n.2

reconcile that statutory scheme with conflicting legislation, and that Respondent cannot justify by the common law analogy that was a useful structural guide in *Heck v. Humphrey,* 512 U.S. 477 (1994). In an attempt to stem § 1983 prisoner suits through a baseless extension of the favorable termination requirement, Respondent mistakes this Court's decisions defining the limited substantive constitutional rights of prisoners for restrictions on the legal remedies available to prisoners whose rights, however limited, have been infringed. Respondent's approach would require this Court to flout the conceptual statutory basis for identifying a favorable termination requirement in the first place, to preclude from federal review a class of § 1983 claims that go to the core of what Congress intended to remedy when it enacted the Civil Rights Act of 1871, and to dispense with the clarity of the rule in *Preiser v. Rodriguez,* 411 U.S. 475 (1978).

I. THIS IS NOT A FACT-OR-DURATION CASE AS MICHIGAN LAW REQUIRES PETITIONER TO SERVE HIS MINIMUM SENTENCE UNALTERED BY GOOD-TIME CREDITS AND AS RESPONDENT IN ANY EVENT HAS WAIVED THIS ARGUMENT.

Respondent's first and principal argument is that Petitioner was required to favorably terminate his claim before he could pursue his § 1983 action because Petitioner's misconduct proceedings resulted in a loss of good-time credits that affected the duration of his confinement. Respondent is factually wrong. Petitioner was sentenced as a habitual offender.[3] Under Michigan law, a defendant

[3] *Michigan v. Mease,* No. 137212, slip op. at 1 (Mich. Ct. App. March 14, 1994) (noting Petitioner's habitual offender status and affirming his convictions on direct appeal). In light of Respondent's new

(Continued on following page)

who was sentenced as a habitual offender must serve his minimum sentence without any reduction of that minimum based upon good-time or disciplinary credits.[4] Success in his civil rights action, therefore, would not shorten Petitioner's

argument regarding good-time credits, Petitioner has filed a request pursuant to Rule 32 to lodge with this Court a copy of the Michigan appellate court's order as well as the following judicially noticeable documents confirming Petitioner's status as a habitual offender: (1) the felony information charging Petitioner as a habitual offender; (2) a docket entry noting that the proceedings on the habitual offender charge would be subsequently held; (3) the judgment of sentence indicating Petitioner's conviction of being a habitual offender; and (4) an excerpt from Petitioner's sentencing transcript in which the judge who imposed sentence noted that Petitioner was a habitual offender who would receive no good-time or disciplinary credits.

[4] Mich. Comp. Laws § 769.12(3) (West Supp. 1990) (habitual offender "shall not be eligible for parole before the expiration of the minimum term fixed by the sentencing judge at the time of sentence without the written approval of the sentencing judge or a successor"); *People v. Carson,* 560 N.W.2d at 674 ("a defendant sentenced as an habitual offender is not entitled to disciplinary credits"); *People v. Martinez,* 532 N.W.2d 863, 865 (Mich. Ct. App. 1995) (habitual offenders "may not earn disciplinary credits" because they "are not eligible for parole before the expiration of the minimum sentence except by written permission of the sentencing judge or the judge's successor"); *People v. Lincoln,* 423 N.W.2d 216, 216 (Mich. Ct. App. 1987) ("To allow disciplinary credits to an habitual offender would defeat the purpose of the [habitual offender statute]."); *Manuel v. Department of Corrections,* 364 N.W.2d 334, 335 (Mich. Ct. App. 1985) ("habitual offenders do not accrue good-time credits, regular or special"); *People v. Owens,* 310 N.W.2d 819, 822 (Mich. Ct. App. 1981) (trial court did not err in failing to inform defendant that because he was a habitual offender his term would be "flat time" and "he would be ineligible for good time or special good time credit, under the [habitual offender] statute as interpreted by the courts"); *Lamb v. Bureau of Pardons and Paroles,* 307 N.W.2d 754, 758 (Mich. Ct. App. 1981) ("a defendant sentenced as a habitual offender may not be paroled prior to the calendar minimum sentence without the approval of the sentencing judge"); *White v. Kapture,* 2001 WL 902500 *6 (E.D. Mich. June 26, 2001) ("Michigan law does not permit habitual offenders to receive good time or disciplinary credits on their sentences").

sentence, and would certainly not "necessarily imply the invalidity of a previous loss of good-time credits." *Edwards v. Balisok,* 520 U.S. 641, 648 (1997). Although the Michigan Department of Corrections continues to calculate the credits that were formerly available, these credits cannot reduce a habitual offender's minimum sentence.[5]

Even if Respondent were correct that Petitioner was deprived of good-time credits, Respondent has waived this argument by failing to litigate it below and by acceding to Magistrate Judge Charles Binder's written finding that there was no loss of good-time credits. Respondent's failure to raise an obvious fact-based defense in the trial court amounts to an intentional relinquishment of any such claim. *See United States v. Olano,* 507 U.S. 725, 733 (1993); *see also Heck,* 512 U.S. at 480 n.2 (noting that Petitioner's argument that prevailing on his damages claims would not invalidate his conviction "comes too late" as Court "did not take this case to review such a fact-bound issue"). Respondent never argued in the district court or in the Sixth Circuit that Petitioner was required to comply with the favorable termination rule because his success in his § 1983 action would restore lost good-time credits. In the district court, Respondent argued, without any mention of good-time credits, that *Edwards v. Balisok* barred Petitioner's § 1983 claim because his claim implied the invalidity of the result of the misconduct hearing, Record 9 at 2-3,

[5] Under the current statutory provision, offenders sentenced for crimes committed after December 15, 2000 – and for certain specified crimes committed after December 15, 1998 – are not under any circumstances eligible for parole until the expiration of the minimum term fixed by the sentencing judge. Offenders such as Petitioner, who was sentenced for a crime committed in 1990, also are not eligible for parole until they have served the minimum term imposed by the sentencing judge, but unlike the later offenders, they are entitled to ask for earlier parole if they obtain the written approval of the sentencing judge or a successor of that judge. Mich. Comp. Laws § 769.12 (4).

suggesting, as he explicitly states now, that the claim is therefore not cognizable under § 1983 "regardless of the punishment imposed." Brief for Respondent at 21, 30. When the magistrate judge rejected Respondent's request to dismiss Petitioner's § 1983 action under *Edwards v. Balisok,* he assumed that "there has been no deprivation of good-time credits" – an assumption Respondent never contested. Respondent's written objections to the magistrate judge's report not only declined to challenge any aspect of the judge's rejection of his request to dismiss Petitioner's suit under *Edwards,* but implicitly agreed that good-time credits were not lost in this case when he noted that "[a]ll that Plaintiff received as a sanction for the misconduct was 7 days detention and 30 days loss of privileges." Record 18 at 6-7. This Court granted certiorari based on the facts as the lower courts understood them, and Respondent cannot now change those facts by asking this Court to engage in impermissible appellate factfinding, even if he had factual grounds or any support in the record for doing so.[6]

II. RESOLUTION OF THE QUESTIONS PRESENTED IN THIS CASE REQUIRES THIS COURT TO INTERPRET A STATUTE, NOT TO ADVANCE "WEIGHTY POLICIES."

Petitioner argued in his opening brief that the favorable termination requirement of *Heck v. Humphrey* does not apply to a § 1983 challenge to the conditions rather than the fact or duration of a prisoner's confinement

[6] Even if Petitioner were not sentenced as a habitual offender and Respondent had not waived this claim, Petitioner's § 1983 action still would not necessarily imply the invalidity of his sentence because the loss of good-time credits resulted only from the conviction for insolence, which is not the focus of this lawsuit. *See infra* Part III. Moreover, nothing in the record shows that prison administrators actually acted upon any requirement to disallow good-time credits.

because such a requirement does not appear in the statute, is inconsistent with its history, and is not needed to reconcile two conflicting statutes. Respondent counters that the favorable termination requirement of *Heck* applies to a § 1983 action that necessarily implies the invalidity *not* of the prisoner's conviction or sentence, but "of a prison misconduct proceeding,- *regardless of the punishment imposed*." Brief for Respondent at 10 (emphasis added). According to Respondent, this rule is compelled primarily by "weighty policies" such as "limitations on the types of constitutional litigation available to prison inmates," "judicial restraint regarding prisoner complaints," and "concerns for prison management and deference to prison officials, particularly in the volatile context of misconduct proceedings." Brief for Respondent at 11-12, 30.

Respondent does not claim to locate this requirement in the terms of § 1983 itself. Nor does he say that a collision between statutes makes favorable termination necessary. He instead supports his thesis with two basic contentions: first, that the favorable termination requirement for certain § 1983 conditions claims somehow materializes from the common law, and second, that it can also be gleaned from this Court's repeated willingness to identify limits to the rights of incarcerated people. Neither of these sources withstands examination, and any policy-based appeal of Respondent's approach cannot salvage a test that contradicts the language, the purpose, and the history of § 1983.

The Fallacy of the Common Law Analogy

The only specific source Respondent identifies for this broad-based favorable termination requirement in non-fact-or-duration cases is the common law. *See* Brief for Respondent at 28-29. This principal facet of Respondent's argument becomes its plainest liability.

Respondent does not say where in the common law he finds this deference to prison management. Though he suggests that the malicious prosecution analogy plays the same role in endorsing his expansion of the favorable termination requirement as it played in *Heck v. Humphrey, Heck* itself refutes this. This Court's reliance upon the analogy of malicious prosecution in *Heck* stemmed specifically from "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. *Heck* recognized the problem with permitting civil litigants to attack judgments that resulted from an elaborate criminal process characterized by myriad procedural protections, a requirement of proof beyond a reasonable doubt, state court review, and the availability of federal habeas corpus review. The common law contains no similar concern, however, for the highly discretionary decisions of prison hearing officers. And that is true with or without the "ample methods" Michigan provides "for inmates to challenge prison misconduct proceedings," Brief for Respondent at 33 – methods that are by no means constitutionally required and that reveal nothing about the intent of Congress, which enacted a statute that applies to more and less beneficent states alike.

More fundamentally, the favorable termination requirement of *Heck v. Humphrey* specifically contemplates a federal forum under the federal habeas statute. Respondent admits that his form of favorable termination in cases that do not affect the fact or duration of confinement would deprive some inmates of any federal review. Brief for Respondent at 11-12, 19-20. Though he deems this fact mitigated by the state review procedures available in Michigan, such a draconian consequence "lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983 – to provide a remedy for the violation of federal rights." *Crawford-El v. Britton,* 523 U.S. 574, 594-595 (1998)

(rejecting a reading of § 1983 that would require plaintiffs – in that case a prisoner – to prove an official's improper motive by clear and convincing evidence).

Respondent further argues that as in *Heck v. Humphrey,* application of the favorable termination requirement to § 1983 actions that necessarily imply the invalidity of an inmate's misconduct proceeding, even in cases not affecting the fact or duration of confinement, "would promote finality and prevent collateral attack." Brief for Respondent at 31. Yet the whole point of § 1983 (not to mention that of federal habeas) is to provide a federal forum to protect federal rights that the state system has not adequately protected, regardless of the presence of finality. The finality that Respondent so venerates sometimes constitutes the very state-sponsored abuse that Congress intended to remedy in § 1983. An analysis focused on finality would have precluded the § 1983 action in the hitching post case, *Hope v. Pelzer,* 536 U.S. 730 (2002), which involved no less an adjudicative process than does Petitioner's case.[7] And because challenges to misconduct proceedings, unlike challenges to criminal judgments, would often have no remedy in habeas corpus, Respondent's paradigm would insulate from federal review the very types of constitutional violations § 1983 was made to remedy.[8]

[7] The sanction is often the most critical aspect of the adjudicative package in prison misconduct and criminal proceedings alike, and Respondent's need to preclude from his test challenges to "the nature or severity of punishment," Brief for Respondent at 32 – on no principled basis except to avoid running afoul of this Court's cases (most notably *Hope v. Pelzer* itself) – reveals the extent to which he has strayed from the underlying purpose of favorable termination.

[8] As in *Crawford-El v. Britton,* "[i]ronically, the heightened standard of proof directly limits the availability of the remedy in cases involving the specific evil at which the Civil Rights Act of 1871 (the

(Continued on following page)

The analogy to malicious prosecution "becomes helpful," as Justice Souter has noted, "not in dictating the elements of a § 1983 cause of action, but in suggesting a relatively simple way to avoid collisions at the intersection of habeas and § 1983." *Heck v. Humphrey,* 512 U.S. at 498 (Souter, J., concurring in the judgment). Thus the analogy's utility stems *not* from any factual similarity between a particular § 1983 claim and the tort of malicious prosecution itself,[9] but from the striking correlation between the interest in protecting a state criminal judgment from a conflicting judgment in a civil malicious prosecution case and the interest in preserving federal habeas as the primary federal means of challenging a state criminal judgment. Just as the favorable termination requirement for malicious prosecution cases provided a way to avoid a clash between a state civil court's judgment and a state criminal court's judgment, it likewise provided the *Heck* Court with a model for reconciling the potential conflict between federal habeas and § 1983 cases when a prisoner uses § 1983 to challenge his underlying conviction or sentence. And unlike Respondent's use of the malicious prosecution analogy, this view honors *Preiser*'s unwavering focus upon the fact or duration of custody and protects the integrity of the habeas exhaustion requirement.

Respondent's reliance upon the malicious prosecution tort warps the discrete structural role the analogy played

predecessor of § 1983) was originally aimed – race discrimination." 523 U.S. at 595 n.16 (citing *Monroe v. Pape,* 365 U.S. 167, 174-175 (1961)).

[9] *Heck*'s holding plainly applies to § 1983 actions whose circumstances do not resemble malicious prosecution as long as "a judgment in favor of the plaintiff would necessarily imply the invalidity of [the inmate's] conviction or sentence." *Heck,* 512 U.S. at 487. In *Edwards v. Balisok,* for example, a decision that never mentions any common law analogy, this Court applied the favorable termination requirement in the context of a biased hearing officer. 520 U.S. at 647.

in *Heck v. Humphrey* by seeking to import the tort's elements directly into § 1983. *See* Brief for Respondent at 28-30. As noted above, *see supra* note 9, such an approach contradicts *Heck*'s holding, which applies the favorable termination requirement across the board to all § 1983 actions that attack a state court judgment, not just those that factually resemble malicious prosecution. 512 U.S. at 487. Moreover, Respondent's attempt to equate a constitutional cause of action brought under § 1983 with the closest-looking common law tort contradicts this Court's reminder that § 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver,* 510 U.S. 266, 271 (1994) (citation and internal quotations omitted). This Court has repeatedly held that the common law on torts is not coextensive with constitutional rights just because a state actor is involved. *See, e.g., Paul v. Davis,* 424 U.S. 693, 711-712 (1976) (defamation by a state actor is not a deprivation of liberty); *Daniels v. Williams,* 474 U.S. 327, 300 (1986) (state actor's negligence causing injury not a "deprivation in the *constitutional sense*") (emphasis in original; citation omitted).

Contrary to Respondent's suggestion, this Court's recognition of immunity for certain defendants in the context of § 1983 cases is not precedent for judicially amending the Civil Rights Act on policy grounds. Rather, this Court has accorded immunity to particular classes of § 1983 defendants only where a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Wyatt v. Cole,* 504 U.S. 158, 164 (1992) (internal quotation omitted). The "policy reasons" the Court referred to are not the "freewheeling policy choice[s]" that a court might make today in determining the scope of an immunity, *see Wyatt,* 504 U.S. at 170 (Kennedy, J., concurring) (citation omitted), but considerations that demonstrate whether Congress meant to exclude from § 1983 immunities

that were otherwise available under the common law. 504 U.S. at 164; *see, e.g., Tenney v. Brandhove,* 341 U.S. 367, 376 (1951) (holding that § 1983 did not abrogate the common law absolute immunity for lawmakers). In other words, an examination of the immunity doctrine's policies and purposes is important to determine whether "irrespective of the common law support . . . § 1983's history or purpose counsel against applying it in § 1983 actions," thereby clarifying whether it was "an immunity at common law that Congress intended to incorporate in the Civil Rights Act." *Wyatt,* 504 U.S. at 164. Although Respondent portrays this Court's treatment of immunities as endorsing the reliance upon policy considerations in interpreting § 1983, *see* Brief for Respondent at 22, the Court's immunity cases uniformly and unambiguously confirm that the only immunities the Court will "read in" to § 1983 are those the Congress would not have intended to abrogate.[10]

The language of § 1983 is not mysterious. The statute contains "two essential elements," which are "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United

[10] Relatedly, the imposition of statutes of limitations in § 1983 cases fails to demonstrate the propriety of judicially amending the statute to honor "weighty policies." In *Felder v. Casey,* 487 U.S. 131, 138 (1987), this Court stated that "[b]ecause statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity." In that case, however, the Court deemed a Wisconsin notice-of-claim statute preempted when a § 1983 suit is brought in state court because there was "no reason to suppose that Congress intended federal courts to apply such rules," which are "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." *Id.* at 140, 153.

States." *Parratt v. Taylor,* 451 U.S. 527, 535 (1981). Neither the statute's terms nor its history reveals any basis for requiring favorable termination in challenges to adjudications like prison misconduct hearings. The common law is undeniably a valuable tool for interpreting statutes. It is not, however, a fitting source from which to devise newfangled elements for a venerable statute designed to enforce deep-rooted constitutional rights.

Respondent's Misplaced Reliance Upon Cases Defining Substantive Rights

Respondent's heavy reliance upon this Court's decisions identifying the parameters of prisoners' constitutional rights leads to his own "great non-sequitur," *see Spencer v. Kemna,* 523 U.S. 1, 988 (1998) – namely, the suggestion that this Court's recognition that the substantive rights of prisoners are sometimes restricted by penological objectives somehow warrants limitations upon the remedies § 1983 can provide to prisoners when those limited rights are violated. In support of his proposition that § 1983 only permits limited causes of action for prisoners, Respondent relies upon cases holding that inmates do not have a reasonable expectation of privacy in their prison cells under the Fourth Amendment, *Hudson v. Palmer,* 468 U.S. 517, 526 (1984), that they do not have a First Amendment right to provide legal assistance to fellow inmates, *Shaw v. Murphy,* 532 U.S. 223, 231-232 (2001), and that they do not have an Eighth Amendment right to be free from negligent diagnosis or treatment of a medical condition, *Estelle v. Gamble,* 429 U.S. 97, 105-106 (1976), or from long-term punitive bans on visitation, *Overton v. Bazzetta,* 123 S. Ct. 2162, 2170 (2003). All of these cases evaluate the nature of the substantive constitutional rights inmates enjoy in prison. They say nothing about whether an inmate who does possess such a right can use § 1983 to seek damages for a prison official's violation of that right.

Respondent has never disputed that a prisoner has a right to be free from retaliatory acts for exercising a protected First Amendment right. Nor could he, as it is "clearly established" that "the First Amendment bars retaliation for protected speech." *Crawford-El v. Britton,* 523 U.S. at 592 (prisoner bringing § 1983 action against corrections officer for retaliating against him for exercising his First Amendment rights need not demonstrate clear and convincing evidence of improper motive to defeat summary judgment motion); *Pickering v. Board of Educ.,* 391 U.S. 563, 574 (1968) (recognizing cause of action under First Amendment for retaliation for the exercise of free speech or other constitutional rights). This long recognized right has already been trimmed to account for the operational concerns of prison systems that are the focus of Respondent's brief. *See, e.g., Wolff v. McDonnell,* 418 U.S. 539, 555-574 (1974); *Sandin v. Conner,* 515 U.S. 472, 477, 480 (1995). There is no basis for reading any additional procedural restrictions into a statute that does not impose them.

The Relevance of the Prison Litigation Reform Act

Respondent's only answer to Petitioner's argument that the Prison Litigation Reform Act (PLRA) proves that Congress's intent in § 1983 prison conditions lawsuits was to require administrative exhaustion rather than favorable termination of judicial remedies is the empty observation that the exhaustion requirement is "independent from" the favorable termination requirement because "exhaustion is a procedural requirement" while "favorable termination is a substantive requirement." Brief for Respondent at 35. Even if Respondent is right that the

favorable termination requirement is substantive,[11] this Court did not deem that distinction important when it explicitly relied upon the PLRA as evidence of what Congress intended in another case in which the Court was asked to identify substantive limitations to § 1983. In *Crawford-El v. Britton*, this Court rejected an argument that in cases in which a prison official's improper motive is a necessary element, § 1983 should be foreclosed unless the plaintiff could adduce clear and convincing evidence of that motive. 523 U.S. at 592-597. In the Court's view, the PLRA "highlights our concern with judicial rulemaking to protect officials from damages actions" given that Congress already curbed prisoner civil rights suits when it enacted provisions in the PLRA that, among other things, require all inmates to pay filing fees, limit attorney's fees, and deny *in forma pauperis* status to prisoners with three or more prior dismissals due to frivolous or malicious filings or for failure to state a claim. *Id.* at 596-597.

With respect to Respondent's "concerns for prison management" and other "weighty policies," Brief for Respondent at 11, Congress already grappled with such considerations when it determined that the policy interests it cared about were best served by an exhaustion requirement, not a favorable termination requirement, for § 1983 prison condition claims. It is implicit in the PLRA's exhaustion requirement that regardless of his success in

[11] Though he is not. Both the PLRA's exhaustion requirement and *Heck*'s favorable termination requirement speak to when the cause of action *accrues* and what actions the prisoner must take before the cause of action can proceed. *See, e.g., Heck*, 512 U.S. at 489 ("a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated") (emphasis added). There is little that is substantive about a rule that requires a prisoner to adjudicate his claim successfully in one forum before he can seek damages in another.

the state proceedings, a prisoner can sue under § 1983 after exhausting his administrative remedies. Here, as in *Crawford-El*, "[i]f there is a compelling need to frame new rules of law" based on Respondent's concerns about comity and deference to the judgment of prison officials, "presumably Congress either would have dealt with the problem in the Reform Act, or will respond to it in future legislation." *Id.* at 597.

III. THOUGH THE QUESTION WHETHER PETITIONER'S CONDITIONS-BASED CHALLENGE STRICTLY ATTACKS THE RESULT OF THE MISCONDUCT HEARING IS IRRELEVANT UNDER *PREISER*, RESPONDENT MISTAKENLY PORTRAYS THE CLAIM AS A COLLATERAL ATTACK ON PETITIONER'S MISCONDUCT CONVICTION.

Respondent argues that Petitioner's § 1983 action is "in effect, a collateral attack on his misconduct conviction." Brief for Respondent at 18. Even if Petitioner were challenging the result of his misconduct proceeding, his § 1983 action could still proceed because his lawsuit is not seeking to cast doubt upon the fact or duration of his confinement in prison. Only under a misreading of *Edwards* that eviscerates the conceptual underpinnings of the rule to which this Court has unfailingly adhered since *Preiser* is the question whether Petitioner is collaterally attacking the outcome of the misconduct proceeding relevant to the viability of Petitioner's claim. If *Preiser* remains good law, an unambiguous challenge to the result of a disciplinary hearing can proceed under § 1983, unhindered by the favorable termination requirement, as long as the claim would not lead to the restoration of good-time credits or

otherwise necessarily imply the invalidity of the prisoner's conviction or sentence.[12]

Respondent's betrayal of *Preiser*'s long-settled framework does him little good, however, because he still fails to establish that success in Petitioner's § 1983 action would necessarily imply the invalidity of the misconduct proceeding. While that is what *Heck*'s test would require if, as Respondent contends, *Heck* applies to prison misconduct hearings, Respondent's brief is devoid of rigorous analysis comparing the § 1983 claim to the result of the misconduct hearing. In his Report and Recommendation on Respondent's motions for dismissal and summary judgment, Magistrate Judge Binder clarified the § 1983 allegations, noting Petitioner's concession of his guilt of the insolence charge[13] and characterizing the complaint as "two-fold: first, that Defendant instigated the entire confrontation to provoke Plaintiff, and second, that when that plan was successful, Defendant then wrote Plaintiff up for a more severe violation[] (one that required mandatory immediate detention), than was warranted by Plaintiff's actions."

[12] In a not-so-veiled request to overrule *Preiser v. Rodriguez sub silentio*, Respondent calls it an "inconsistent and illogical result" to allow a prisoner punished with several years of administrative segregation to bring a § 1983 challenge but to forbid such an action for a prisoner who loses only one day of good-time credits. Brief for Respondent at 32. In its examination of the intersection between § 1983 and habeas, this Court in *Preiser* unambiguously endorsed this bright line between challenges to conditions and challenges to fact or duration that Respondent deems so illogical. *Preiser*, 411 U.S. at 488-490; *see also Heck v. Humphrey*, 512 U.S. at 486-487.

[13] While Respondent suggests that Petitioner's concession of guilt of insolence is a new admission and a "current litigation posture" that he only "now" makes in the Supreme Court, Brief for Respondent at 17, the magistrate judge adopted this position at the very outset of this litigation in his first Report and Recommendation on Respondent's initial motion to dismiss. Brief in Opposition 27a (noting that "Plaintiff agrees that he was guilty of Insolence").

Brief in Opposition 32a; *see also* JA 72 (Petitioner's amended complaint claiming that "Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of First Amendment rights," specifying that his injury resulted from "defendant's threatening conduct and retaliatory disciplinary action," and requesting damages for injuries "sustained as a result of defendant's retaliatory acts").

Respondent's approach to both the instigation aspect and the overcharging aspect of Petitioner's claim founders because even under his own misguided legal test Respondent cannot satisfy *Heck*. With respect to the instigation aspect of Petitioner's § 1983 action, Respondent essentially acknowledges that his retaliatory actions were not a defense to Petitioner's insolence conviction; Petitioner's success on this claim could therefore not invalidate the result of a prison proceeding. Respondent also fails to satisfy his own test with respect to Petitioner's claim that Respondent overcharged Petitioner for an unconstitutional reason and caused him to serve six days of prehearing detention.[14]

[14] As a threshold matter, the procedural realities of Michigan's disciplinary system wholly undermine Respondent's argument that this claim caused Petitioner no injury because "Petitioner's sentence as a result of his Insolence conviction was really thirteen days of total detention." Brief for Respondent at 18. A Michigan hearing officer has the discretion to give credit for time served in administrative segregation, but he "is not required to do so," *see* JA 31, and the hearing officer in this case gave no such credit. His report states that Petitioner was given "7 Days of Detention" beginning the day of the hearing, May 27, 1997, and ending June 3, 1997. JA 58-59. Magistrate Judge Binder also viewed the prehearing and posthearing detentions as separate injuries, noting that the seven days of detention was not at issue given Petitioner's conceded guilt of insolence but that the six days of mandatory prehearing detention, which "Plaintiff experienced as a result of being charged with a nonbondable offense," were "definitely in issue," notwithstanding that concession. Brief in Opposition 27a. *See also* Record 18 at 6-7 (Respondent stating that "[a]ll that Plaintiff received as a sanction for the misconduct was 7 days detention and 30 days loss of privileges").

Respondent cannot demonstrate that Petitioner's overcharge claim constitutes a collateral attack on the prison misconduct hearing because he cannot identify any extant judgment arising out of that proceeding that Petitioner's § 1983 action would remotely undermine. The claim that Respondent unconstitutionally framed Petitioner is not conducive to a conventional habeas remedy because Petitioner was found not guilty of threatening conduct and in any event had already served the detention caused by the overcharging.[15]

When Respondent cannot show that Petitioner's instigation and overcharge claims would necessarily invalidate the result of the misconduct proceeding, he invents his own tests to bring Petitioner's claim within the scope of the favorable termination requirement. With respect to the allegation of retaliatory instigation, for example, Respondent concedes that the facts surrounding the unconstitutional motive would at most be relevant to the credibility of witnesses but suggests that this relevance is enough to trigger a requirement to favorably terminate. Brief for Respondent at 6. In an extreme departure from the "necessarily invalidates" test of *Heck v. Humphrey,* then, Respondent in effect contends that any time evidence pertaining to the crux of an inmate's § 1983 claim would have been *admissible* in the misconduct hearing, the inmate must favorably terminate. Such a rule

[15] Respondent's argument that "[a] prisoner challenging the validity of a misconduct proceeding that resulted in punishment affecting only the conditions of confinement is subject to the favorable termination requirement even if he is no longer subject to the conditions at the time he brings his § 1983 action" is unsupportable for the same reasons his legal test is unsupportable: it is contrary to the statute's language and purpose and a radical departure from this Court's unvarying approach to the issue up to now. *See* Brief for Petitioner at 44-50.

would stray far from the rationale of avoiding collateral attack through an inappropriate vehicle.

Petitioner also cannot satisfy *Heck*'s "necessarily invalidated" test on the overcharge claim, so he concocts an entirely new "but-for" test that he says compels the conclusion that Petitioner was collaterally attacking the finding of insolence because Petitioner would not have been found guilty *but for* Respondent's retaliatory actions in overcharging him with threatening behavior. This reliance upon a type of "but-for" causation derives from no known legal principle. The proper inquiry for determining when the favorable termination requirement should apply to Petitioner's lawsuit is whether the claim "necessarily impl[ies] the invalidity of his conviction or sentence," *Heck,* 512 U.S. at 487 – a test we know Respondent cannot meet even if *Heck* were extended to the results of misconduct proceedings. *But for* an officer's unlawful arrest of a citizen, that citizen may not have assaulted the officer, but that does not make the unlawful arrest a defense to assault on a police officer. Respondent's "but-for" test would likewise preclude a § 1983 action against a guard who trumped up charges against a prisoner on racial grounds if the prisoner responded by committing a misconduct violation: but for the prison guard's unconstitutional actions, the misconduct sanction would not have occurred. Section 1983's language and purpose cannot plausibly countenance such a result.

CONCLUSION

This Court should reverse the decision of the Sixth Circuit and remand to that court for further proceedings.

Respectfully submitted,

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